*** HON'BLE SRI JUSTICE SAMUDRALA GOVINDARAJULU**

+ WRIT PETITION Nos.4766, 5035 of 2001

& W.P.No.6153 of 2005

% Dated 22-03-2012

Tata Cellular Limited
5-9-62, Khan Latif Khan Estate,
Fathe Maidan Road, Hyderabad

.... Petitioner.

Vs.

$ Government of Andhra Pradesh,
rep.by its Secretary, Civil Supplies
Department, Hyderabad
District Educational Officer,
Visakhapatnam, A.P. and others

.... Respondents

! Counsel for the Petitioner:

Sri B.Adinarayana Rao,
Sri S.Niranjan Reddy

^ Counsel for the Respondents:
G.P.for Civil Supplies

<GIST:

> HEAD NOTE:

? Cases referred
1. ILR2010KAR1968
2. 2011 XAD (Delhi) 10
3. (2005) 1 SCC 308

4. 2011(8) Scale 227
5. (2006) 3 Supreme Court Cases I
6. (2002) 126 STC 475 (Ker)

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COMMON ORDER:

The petitioners in these three writ petitions are Cellular Phone Service Providers in the State. They are aggrieved by actions of the respective Inspectors of Legal Metrology (Weights and Measures) Department at various places. They seek *Mandamus* in these writ petitions declaring that sale of Freedom cards and recharge coupons by TATA Cellular Limited and sale of AIRTEL prepaid cards and recharge cards/coupons as well as post-paid cards and kits by Bharti Cellular Limited for providing Cellular Mobile telephone services to the respective subscribers do not require compliance of provisions of Standards of Weights

and Measures Act, 1976 (in short, the 1976 Act), Standards of Weights and Measures (Enforcement) Act, 1985 (in short, the 1985 Act) and the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 (in short, the Rules) and consequently to quash seizures of such cards and coupons by the respective Inspectors of Legal Metrology (Weights and Measures) for the alleged violation of the said Acts and Rules. It is the petitioner's contention that the said SIM (Subscriber Identity Module) cards and recharge coupons are not of 'pre-packed commodities' within the meaning of the said Acts and Rules. The petitioner's are holders of licence and are permitted to carry on operations of providing mobile cellular telephone services within the Andhra Pradesh Circle and are governed by the provisions of Indian Telegraphic Act, 1885 and Indian Wireless Telegraphy Act, 1933. It is stated that the petitioners instal and run applicable systems and the services provided by them to the subscribers are at the rates fixed by the Telecom Regulatory Authority of India (TRAI) and that the petitioners are obliged to provide and implement such services as decided by the authority confirming to the Global System for Mobile Communications (GSM) standards

issued by European Telecom Institute and that for effectively marketing their services, the petitioners had appointed various dealers besides opening various service points across the State. It is contended that the petitioners are offering the above cards and coupons which contain necessary software packages at various commercial establishments, dealer outlet shops etc. at various denominations. According to the petitioners, there is a sale of neither product nor commodity, but it is only a charge for the service to be provided, collected in advance from the subscriber and that the amounts paid for prepaid cards and recharge coupons are paid in advance for the services offered by the petitioners in future. On behalf of the respondents, counters are filed in two out of three writ petitions. It is contended by the petitioners that prepaid and post paid cards and recharge coupons contain necessary software packages and that the package contains SIM card, which is computer software generated chip inserted in the hand set the cellular or mobile phone to activate the card or services of the phone's net work. It is contended by the Assistant Government Pleader that SIM card is a pre-packed commodity or article within the meaning of Rule 2(l)

of the Rules and that the chip has definite predetermined value in terms of air time used for conversation based on which the charges are levied and that since SIM card is a pre-packed commodity, or article, it is liable to comply with the requirements of Rule 6(1) and Rule 2(r) of the Rules and that by adding administration fee of Rs.50/- to MRP declared on the package which is inclusive of all taxes, the petitioners have violated those Rules. The respondents justify the actions of the respective Inspectors of Legal Metrology (Weights and Measures) of various places in making inspections and effecting seizures of SIM card packets.

2. The petitioners' counsel in these three writ petitions placed reliance on **Bharati Airtel Limited v State of Karnataka**[1] of the Karnataka High Court and **Aircel Limited v Govt.of NCT of Delhi**[2] of the Delhi High Court and contended that SIM cards and recharge coupons are not commodities within the meaning of the 1976 Act, the 1985 Act and the Rules.

3. On the other hand, Assistant Government Pleader for the respondents placed reliance on **Tata Consultancy**

Services v State of Andhra Pradesh[3] and **Idea Mobile Communication Limited v C.C.E. and C, Cochin**[4] of the Supreme Court and contended that though SIM card contains software to provide access to the net work of the service providers, the said software is in a tangible property and therefore a commodity or goods. Both the petitioners' counsel as well as the Assistant Government Pleader equally placed reliance on various observations made by the Supreme Court in **Bharat Sanchar Nigam Limited v Union of India**[5]**,** wherein the Supreme Court considered whether telephone service (mobile or fixed) is a transaction which attracts definition of 'goods'.

4. According to the respondents, the chip known as SIM card is pre-packed commodity or article and is liable to comply with requirements of Rule 6(1) and Rule 2(r) of the Rules. Either in the 1976 Act or in the 1985 Act, or in the Rules there is no definition of 'commodity'. Rule 2(l) of the Rules defines 'pre-packed commodity' in the following terms:

> "pre-packed commodity", means a commodity, which without the purchaser being present, is placed in a package of whatever

> nature, whether sealed or opened, so that the commodity contained therein has a pre-determined value and includes those commodities which could be taken out of the package for testing or examining or inspecting the commodity"

5. Article 366(12) of the Constitution defines 'goods' as including all materials, commodities and articles. No doubt, the said definition of 'goods' in Article 366(12) is in the context of using the said expression in the constitution. In Oxford Dictionary - Thesaurus and word power guide, synonyms of 'commodity' are given as item, material, product, article, object. Webster's New Word Dictionary gives meaning of 'commodity' as any useful thing, anything bought and sold, any article of commerce. From these meanings and definitions, it can be safely said that in the context of the Rules, commodity means anything, which is bought and sold in commercial parlance.

6. Contravention alleged against the petitioners are under 6(1) of the Rules and more particularly Clause (f) of Rule 6(1). As per Rule 6(1) (f), every package shall bear thereon or on a label squarely fixed thereto a definite, plain and conspicuous declaration as to the retail sale price of the

package. Section 2(r) of the Rules defines 'retail sale price' as follows:

> "retail sale price" means the maximum price at which the commodity in packaged form may be sold to the ultimate consumer and where such price is mentioned on the package, there shall be printed on the packages the words "Maximum (or Max) retail price …. inclusive of all taxes (or in the form MRP Rs…… incl. of all taxes)"

In the light of the above provisions contained in the Rules, it has to be seen whether SIM card or Recharge coupon in pre-packed form is a commodity under the Rules.

7. In **Bharati Airtel (1 supra),** the Karnataka High Court came to the conclusion that there is no transfer of property in the goods and that the petitioner's contention about the devices always remaining as the property of the petitioner has to be accepted. The Karnataka High Court repelled contention of the State and finally came to the following conclusion:

> "The contention on behalf of the State that the devices do carry a price and the illustration by reference to a hypothetical situation, if the device is lost or damaged, and when it is required to be replaced, the amount that may be charged by the petitioner in respect of the same would be the price and this ought to be indicated, as the commodity is

> in a packaged form and displayed in retail outlets of the petitioner, is not a tenable ground which would attract the provisions of the SWM Act and the Rules. The emphasis under the provisions of the Act and the Rules is in respect of commodities which are intended for sale, by themselves. Though the commodities in question are displayed in packed form they are not meant for sale by themselves. It is always coupled with or incidental to the subscriber availing the services provided by the petitioner. Further, as there is clearly an agreement by the subscriber to surrender the devices on termination of the contract, it cannot be said that there is any element of sale involved. The suggestion on behalf of the respondents that the petitioner has devised a way to include the cost of the device into the service charges that are imposed, cannot be accepted as a finding of fact without there being an adjudication in this regard. Hence, on a prima facie test, it ought to be held that the proceedings sought to be initiated by the third respondent in the case on hand is misplaced".

8. In **Aircel (2 supra),** the Delhi High Court held that SIM card and recharge coupon are not goods, but an integral part of mobile services. It was also held therein that preamble of the 1976 Act is indicative of the services being outside the purview of the said Act.

9. In both the above Karnataka as well as Delhi decisions, there is reference to the pronouncement of the Supreme Court in **Bharat Sanchar Nigam (5 supra).** In the Delhi decision, there is also reference to **Idea Mobile (4 supra).**

10. In **Tata Consultancy Services (3 supra),** the Supreme Court was considering the question whether computer software packages off the shelf (canned software) are goods under the provisions of Andhra Pradesh General Sales Tax Act, 1957, sale of which attracts sales tax or commercial tax leviable thereunder. The Supreme Court took note of the fact that a software is intellectual property and in spite of it, when once it is contained in a medium which is bought and sold, it is an article of value. The Supreme Court held:

> "A software may be intellectual property but such personal intellectual property contained in a medium is bought and sold. It is an article of value. It is sold in various forms like floppies, disks, CD-ROMs, punch cards, magnetic tapes, etc. Each one of the mediums in which the intellectual property is contained is a marketable commodity. They are visible to senses. They may be a medium through which the intellectual property is transferred but for the purpose of determining

the question as regard leviability of the tax under a fiscal statute, it may not make a difference. A programme containing instructions in computer language is subject matter of a licence. It has its value to the buyer. It is useful to the person who intends to use the hardware, viz., the computer in an effective manner so as to enable him to obtain the desired results. It indisputably becomes an object of trace and commerce. These mediums containing the intellectual property are not only easily available in the market for a price but are circulated as a commodity in the market. Only because an instruction manual designed to instruct use and installation of the supplier programme is supplied with the software, the same would not necessarily mean that it would cease to be a 'goods.' Such instructions contained in the manual are supplied with several other goods including electronic ones. What is essential for an article to become goods is its marketability.

If a canned software otherwise is goods, the Court cannot say it is not because it is an intellectual property."

11. In **Bharat Sanchar Nigam (5 supra),** the Supreme Court endorsed the following observations in **Tata Consultancy Services (3 supra)** as the correct approach to the question as to what are goods for the purpose of sales tax and adopted the same:

"A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having

regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customised satisfies these attributes, the same would be goods."

12. The Supreme Court further referred decision of **Escotel Mobile Communications Limited v Union of India**[6] of the Kerala High Court wherein it was held that a SIM card merely represented a means of the access and identified the subscribers and that this was part of the services of telephone connection and that therefore SIM card was goods within the definition contained in Kerala Sales Tax Act. After referring finding of the Kerala High Court in **Escotel (6 supra),** the Supreme Court observed:

"It is not possible for this Court to opine finally on the issue. What a SIM card represents is ultimately a question of fact, as has been correctly submitted by the States. In determining the issue, however the assessing authorities will have to keep in mind the following principles: if the SIM card is not sold by the assessee to the subscribers but is merely part of the services rendered by the service providers, then a SIM card cannot be charged separately to sales tax. It would depend ultimately upon the intention of the parties. If the parties intended that the SIM card would be a separate object of sale, it

> would be open to the Sales Tax Authorities to levy sales tax thereon. There is insufficient material on the basis of which we can reach a decision. However we emphasise that if the sale of a SIM card is merely incidental to the service being provided and only facilitates the identification of the subscribers, their credit and other details, it would not be assessable to sales tax". (stress is mine).

13. The Supreme Court thus left the decision open on SIM cards depending upon the method of collecting charges on SIM card. In **Idea Mobile (4 supra),** the Supreme Court took note of the fact that it was conceded by the State before the Kerala High Court that SIM card has no intrinsic sale value and it is supplied to the customers for providing mobile service to them.

14. In all the above three cases before the Supreme Court, the question arose in relation to assessment of sales tax or service tax on sale of SIM cards and recharge coupons. None of those cases raised a question whether SIM card or recharge coupon are commodities or pre-packed commodities under the 1976 Act and the Rules. There can be no dispute of the fact that in case of pre-paid connection, either at the time of giving mobile Cellular connection through SIM card or recharging credit of talk time

subsequent to giving Cellular connection through SIM card, the customer pays for value of talk time both at the time of purchase of SIM card or purchase of recharge coupon. In addition to paying for the talk time, the customer pays administrative charges and activation charges in case of purchase of SIM card relating to pre-paid connection. In the case of post-paid connection, the service provider charges activation charges and administration charges and no talk time charges at the time of giving service through SIM card to the customer. Except the SIM card serving as a medium or modem containing software to facilitate the customer to have access to the service provider's net work, the SIM card has no intrinsic value at all. Whether the service provider is assessed to sales tax or service tax in relation to the transactions of sale of SIM card or recharge coupon, neither SIM card nor recharge coupon can be termed as commodity having any commercial value. In that view of the matter, I am of the opinion that either SIM card or recharge coupon of the petitioners who are Cellular Phone Service Providers are neither commodities nor pre-packed commodities for the purpose of the 1976 Act or the 1985 Act or the Rules.

15. Hence, all three writ petitions are allowed as

prayed for, making rule nisi absolute. No costs.

SAMUDRALA GOVINDARAJULU,J

Dt. 22nd March, 2012

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[1] ILR2010KAR1968
[2] 2011 XAD (Delhi) 10
[3] (2005) 1 SCC 308
[4] 2011(8) Scale 227
[5] (2006) 3 Supreme Court Cases 1
[6] (2002)126 STC 475 (Ker)